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CONSULTING SERVICES AGREEMENT BETWEEN

THE CITY OF MILPITAS AND SWINERTON MANAGEMENT & CONSULTING, INC.

THIS AGREEMENT for consulting services is made by and between respectively the City of Milpitas and the Milpitas Redevelopment Agency (hereinafter referred to for convenience only as "City") and Swinerton Management & Consulting ("Consultant") (together sometimes referred to as the "Parties") as of February 8, 2006 (the "Effective Date") in Milpitas, California.

Section 1. SERVICES. Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Consultant's Duties and Services attached as **Exhibit A** at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and **Exhibit A**, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the Effective Date and shall end on **January 2nd, 2008**, and Consultant shall complete the work described in **Exhibit A** by that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as provided for in Section 8. The Consultant shall not be responsible for delays caused by the City or by causes beyond the Consultant's reasonable control as determined by the City.
- 1.2 **Standard of Performance.** The Consultant: (a) shall fulfill and perform all of its obligations under this Agreement, and (b) shall perform all professional services in the manner specified by this Agreement and in accordance with the currently prevailing standards of professionals with the level of experience and training similar to Consultant working in the geographical area in which Consultant practices its profession. Consultant represents themselves as a recognized leader and experienced practitioner in the field of work for the scope of this project and are responsible for performing all work appropriate and necessary to manage Capital Improvement Projects.
- 1.3 **Assignment of Personnel.** Consultant shall assign those persons designated in **Exhibit C** to perform services pursuant to this Agreement. Consultant shall not remove or reassign any designated personnel from the Project without the prior written consent of the City, which City shall not unreasonably withhold. The Consultant shall be allowed to substitute personnel without prior City approval if a designated person leaves the Consultant's employ or is otherwise physically unable to perform the job duties. The new person shall be at least of equal status and experience to the designated person. If City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any designated persons, Consultant shall, upon receiving notice from City, shall reassign such person or persons. The persons designated in **Exhibit C** represent the minimum staff to be provided by Consultant. Consultant shall assign additional persons to perform services if they are necessary to meet all of Consultant's obligations under this Agreement, including but not limited to the quality and timeliness of performance required by Section 1.2 above. The Consultant shall keep the City informed of personnel assignments related to this project. City may require Consultant to provide monthly labor reports if City feels that appropriate personnel are not being assigned to project. The

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Consultant shall disclose to the City in writing any known contractual relationship Consultant has that would favor a supplier or contractor or would create a conflict of interest.

1.4 Time.

Consultant shall devote such resources, money, personnel, and time to the performance of all of its obligations under this Agreement as may be reasonably necessary to fulfill those obligations, including but not limited to the standard of performance provided in Section 1.2 above.

Consultant shall complete each phase by the date scheduled in Exhibit A.

Section 2. COMPENSATION.

City hereby agrees to pay Consultant a lump sum amount not to exceed \$880,000, for all services to performed and reimbursable costs incurred under this Agreement, as shown in Exhibits A and B. The City shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from the City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consultant further represents that the amount of the compensation specified in Section 2 shall be a guaranteed maximum price. Hourly rates for personnel performing services shall be as shown in Exhibit B. Consequently, the parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement. Consultant shall immediately disclose to the City in writing any compensation received by Consultant from persons other than the City if that compensation relates to the Project.

2.1 Completion On Schedule.

The Consultant shall manage each project to completion adhering to the approved project schedules.

2.2 Invoices

Consultant shall submit invoices not more often than once a month during the term of this Agreement, based on the cost of services performed and reimbursable costs incurred during the billing period. Invoices shall contain the following information:

Serial identifications of progress bills; i.e., Progress Bill No. 1 for the first invoice, etc.;

The beginning and ending dates of the billing period;

A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion;

A tabulation of Reimbursable Expenses for the billing period;

Total invoice amount, total billed to date, and remaining amounts, for each phase.

Certification of the lack of compensation on the Project other than compensation from the City;

False Claims Act certification in the form set forth in Exhibit E; and
the Consultant's signature.

2.3 Monthly Payment

City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have 30 days from the receipt of an invoice that complies with all of the requirements above to pay Consultant. The Consultant shall provide reasonable information for the City to evaluate monthly progress billing.

2.3.1 Retention

N/A

2.3.2 Additional Withholding

City shall have the right to withhold an amount from any payment, including final payment, to compensate the City for costs, fees, damages and other amounts incurred by the City to the extent that such City's incurrence of said amounts was caused, in whole or in part, by (a) the willful misconduct, breaches of this Agreement, negligent violations of law, or negligent acts or omissions of Consultant or its employees, subcontractors, or agents, (b) acts for which they could be held strictly liable, (c) or as provided for elsewhere in this contract.

2.4 Total Payment. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. If Consultant performs services pursuant to the City's request (see Section 2.10 below) that are not within the scope of Exhibit A, then Consultant shall be paid for those services based on the hourly rates for additional services specified in **Exhibit B**.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a phase or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed amendment.

2.5 Additional Services. A contingency amount \$60,000 is included in the contract that may not be used without express written authorization by the City for additional services. Fees for approved work performed by Consultant on an hourly basis shall not exceed the amounts shown on the following fee schedule attached hereto as **Exhibit B**. These fees shall apply through the end of the calendar year in which this Agreement is signed and shall be adjusted each year to be the lesser of the Consultant's standard billing rates or an increase no more than the change in San Francisco-Oakland-San Jose All-Urban Consumers Price Index.

2.6 Reimbursable Expenses. Reimbursable expenses are specified in **Exhibit B**, and shall not exceed **\$10,000**. Expenses not listed in **Exhibit B** are not chargeable to City. Reimbursable expenses are included in the total amount of compensation provided under this Agreement. This amount shall not be exceeded without written authorization of the City and an appropriate increase in the Reimbursable Expense Budget. Travel, food, and accommodations are not reimbursable expenses.

2.7 Payment of Taxes. Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.

2.8 Payment upon Termination If the City terminates this Agreement without cause, pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable

expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets in order to verify costs incurred to that date. If the City terminates this Agreement for cause the City shall not be required to make any further payment to the Consultant, and Consultant forfeits all current accrued retention to-date, except that withheld from previous, satisfactorily completed phases as liquidated damages for the loss to the City to administer the completion of the work by others.

- 2.9 Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of authorization from the City. Consultant shall notify the City in writing and receive written authorization to proceed, prior to doing any work that Consultant asserts is beyond the scope of work of the present contract phase. Consultant shall not delay in commencing the work after receiving authorization to proceed. ~~Consultant acknowledges that timely performance of services is paramount to avoid delay to the Project and damages to the City.~~
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2.10 Responsibility for Additional Costs. N/A

Section 3. FACILITIES AND EQUIPMENT. Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. For Consultants providing City Staff extension, City shall make available to Consultant only office space and the facilities and equipment listed in **Exhibit K** and only under the terms and conditions set forth therein.

Section 4. INSURANCE REQUIREMENTS. Before beginning any work under this Agreement, Consultant, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Consultant shall provide policies to City that meet the requirements of this section. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of insurance shall be included in the Consultants fees, except for cost of additional insurance that may be provided by the City. Consultant shall not allow any subconsultant to commence work on any subcontract until Consultant has obtained proof that they are adequately covered by all necessary and prudent insurance. The Consultant shall submit the required certificates of insurance or policies upon submitting an executed original of this Agreement.

- 4.1 Workers' Compensation.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than ONE MILLION DOLLARS (\$1,000,000.00) per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the Labor Code shall be solely in the discretion of the City. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

4.2 Commercial General and Automobile Liability Insurance.

4.2.1 General requirements. Consultant, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of -- owned, non-owned, or hired automobiles, to the extent that they exist.

4.2.2 Minimum scope of coverage. Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Company-owned automobiles, if any shall be covered at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) or comparable current coverage. Code 1. No endorsement shall be attached limiting the coverage. Consultant shall notify City if any company owned vehicles exist, or if there are any changes in ownership of vehicles owned by the company.

4.2.3 Additional requirements. Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:

- The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- Any failure of Consultant to comply with reporting provisions of the policy shall not affect coverage provided to City and its officers, employees, agents, and volunteers.

4.3 Professional Liability Insurance.

4.3.1 General requirements. Consultant, within the fee described in Exhibit B shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000) covering the licensed professionals' errors and omissions. Any deductible or self-insured retention shall not exceed \$250,000 per claim

4.3.2 Claims-made limitations. The following provisions shall apply if the professional liability coverage is written on a claims-made form:

- The retroactive date of the policy must be shown and must be before the date of the Agreement.
- Insurance must be maintained and evidence of insurance must be provided for at least five years after completion of the Agreement or the work, as long as it is

reasonably available at that time, to the extent provided in the fee structure of Exhibit B.

- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant must provide extended reporting coverage for a minimum of three years after completion of the Agreement or the work. The City shall have the right to exercise any extended reporting provisions of the policy, if the Consultant cancels or does not renew the coverage.
- d. A copy of the claim reporting requirements must be submitted to the City prior to the commencement of work under this Agreement.

4.4 All Policies Requirements.

- 4.4.1 **Acceptability of insurers.** All insurance required by this section is to be placed with insurers with Bests' rating: no less than A- XV for general liability, auto and professional liability; and no less than A XV for Workers' Compensation.
- 4.4.2 **Verification of coverage.** Prior to beginning any work under this Agreement, Consultant shall furnish City with complete certificates of insurance and certified copies of all policies, including complete certified copies of all endorsements. All copies of certificates, policies and certified endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf.
- 4.4.3 **Notice of Reduction in or Cancellation of Coverage.** An endorsement shall be attached to all insurance obtained pursuant to this Agreement stating that coverage shall not be suspended, voided, canceled by either party, except after thirty (30) days' prior written notice by mail has been given to the City. If any coverage required by this section is reduced, limited, cancelled, or materially affected in any other manner known to Consultant, Consultant shall provide written notice to City at Consultant's earliest possible opportunity and in no case later than ten (10) working days after Consultant is notified of the change(s) in coverage.
- 4.4.4 **Additional insured; primary insurance.** Except for the professional liability and workers' compensation policies, a certified endorsement at least as broad as Insurance Services Office form number CG 20 10 (11/85 ed.) shall be attached to all policies stating that the City and its officers, employees, agents, and volunteers shall be covered as additional insureds with respect to each of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant, as applicable; premises owned, occupied, or used by Consultant; and automobiles owned, leased, or used by the Consultant in the course of providing services pursuant to this Agreement. The coverage shall contain no special limitations on the scope of protection afforded to City or its officers, employees, agents, or volunteers.

A certified endorsement shall be attached to all policies stating that coverage is primary insurance with respect to the City and its officers, officials, employees and volunteers, and that no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.

4.4.5 Deductibles and Self-Insured Retentions. Consultant shall disclose to and obtain the approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement.

During the period covered by this Agreement, only upon the prior express written authorization of City, Consultant may increase such deductibles or self-insured retentions with respect to City, its officers, employees, agents, and volunteers, which authorization shall not be unreasonably withheld.

4.4.6 Subconsultants. Consultant shall include all subconsultants as insured's under its policies or shall furnish separate certificates and certified endorsements for each subconsultant.

4.4.7 Variation. The City may approve a variation in the foregoing insurance requirements, upon a determination that the coverage, scope, limits, and forms of such insurance are either not commercially available, or that the City's interests are otherwise fully protected.

4.5 Remedies. In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement, for cause.

Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES.

Consultant shall indemnify, defend and hold harmless the City and its officials, officers, employees, agents (other than the construction contractor(s)), and volunteers from and against any and all losses, liability, claims, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, to the extent caused, in whole or in part, by (a) the willful misconduct, breaches of this Agreement, negligent violations of law, or negligent acts or omissions of Consultant or its employees, subconsultants, or agents, or (b) acts for which they could be held strictly liable. The foregoing obligation of Consultant shall not apply when (1) the injury, loss of life, damage to property, or violation of law arises wholly from the negligence or willful misconduct of the City or its officers, employees, agents, or volunteers, and (2) the actions of Consultant or its employees, subcontractor, or agents have contributed in no part to the injury, loss of life, damage to property, or violation of law. It is understood that the duty of Consultant to indemnify and hold harmless includes the duty to defend as

set forth in Section 2778 of the California Civil Code. Acceptance by City of insurance policies and endorsements required under this Agreement does not relieve Consultant from liability under this indemnification and hold harmless clause.

This indemnification and hold harmless clause shall apply to any such damages or claims for damages whether or not such insurance policies shall have been determined to apply. By execution of this Agreement, Consultant acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

If Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of City, Consultant ~~shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer~~ contributions for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

Section 6. STATUS OF CONSULTANT.

- 6.1 **Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subsection 1.3. Otherwise, City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.
- 6.2 **Consultant No Agent.** Except as City may specify in writing in this Agreement or elsewhere, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent or to bind City to any obligation whatsoever.

Section 7. LEGAL REQUIREMENTS.

- 7.1 **Governing Law.** The laws of the State of California shall govern this Agreement.
- 7.2 **Compliance with Applicable Laws.** Consultant and any subconsultant shall use due care to comply with all laws applicable to the performance of the work hereunder. Consultant shall exercise due care that the design and bid documents comply with all laws, regulations, and good practices. Consultant's activities in conducting business shall comply with all applicable laws and regulations.
- 7.3 **Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply

with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.

- 7.4 **Licenses and Permits.** Consultant represents to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of any nature whatsoever that are legally required to practice their respective professions. Consultant represents to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.

- 7.5 **Nondiscrimination and Equal Opportunity.** ~~Consultant shall not discriminate, on the basis~~ of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, or bidder for a subcontract. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in all subcontracts.

Section 8. TERMINATION AND MODIFICATION.

- 8.1 **Termination.** City may terminate this Agreement at any time with or without cause upon written notification to Consultant. In the event of termination without cause, Consultant shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement. City understands that incomplete design work and related calculations, and documents may not be suitable for use

If any dispute exists between Consultant and City, Consultant must continue to perform all of its services. City agrees to participate in non-binding mediation if a dispute cannot be resolved informally by the Parties. Consultant must submit its disagreement in writing to the City along with any relevant documentation.

- 8.2 **Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall be specified in writing by the City. Consultant understands and agrees that the extension, in and of itself, shall not obligate the City to provide Consultant with compensation beyond the amounts provided for in this Agreement.
- 8.3 **Amendments.** The parties may amend this Agreement only by a writing signed by all the parties.

- 8.4 **Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's professional competence, experience, and professional knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the personal reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the City. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subconsultants noted in the proposal, without prior written approval of the City.
- 8.5 **Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.
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- 8.6 **Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, the City shall give the Consultant notice and reasonable opportunity to correct the breach. If the Consultant fails to correct the breach to the City's satisfaction, City's remedies shall include, in addition to all other remedies available to City under this Agreement and law, the following:

8.6.1 Terminating the Agreement;

- 8.6.2 Retaining the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement, including rights to use any designs, concepts, or work;

Hiring a different Consultant to complete the work described in Exhibit A not finished by Consultant, or City staff may complete such work; and/or

Terminating the Agreement for any breach shall require forfeiture by the Consultant to any claim to all retention held by the City to-date, and the current month's payment otherwise owed to the Consultant and any other amount otherwise owed to Consultant by City under this Agreement.

Section 9. KEEPING AND STATUS OF RECORDS.

- 9.1 **Records Created as Part of Consultant's Performance.** All significant work products, including drawings and specifications, reports, maps, models, charts, studies, surveys, and photographs, plans, studies, specifications, records, files or any other documents or materials in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City in the normal course of work or upon termination of the Agreement. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. Consultant agrees that, until final approval by City, all data, plans, specifications, reports and other documents are confidential and will not be released to third parties without prior written consent of City.

- 9.2 **Consultant's Books and Records.** Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of three (3) years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.
- 9.3 **Inspection and Audit of Records.** Any records or documents that Section 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds TEN THOUSAND DOLLARS (\$10,000.00), the Agreement shall be subject to the examination and audit of the State Auditor at the request of City, or as ~~part of any audit of the City, for a period of three (3) years after final payment under the~~ Agreement.

Section 10 MISCELLANEOUS PROVISIONS.

- 10.1 **Mediation.** If a dispute arises out of or is related to this Agreement, or the breach thereof, and if the said dispute cannot be settled through direct discussions, the City and the Consultant, as parties to this Agreement, agree to first endeavor to settle this dispute in an amicable manner by mediation through a mutually agreed-to mediation service before having recourse to a judicial forum.
- 10.2 **Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.
- 10.3 **Venue.** If either party brings any action against the other under this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Santa Clara or in the United States District Court for the Northern District of California.
- 10.4 **Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.
- 10.5 **No Implied Waiver of Breach.** The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.6 **Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the parties.
- 10.7 **Use of Recycled Products.** Consultant shall endeavor to prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.

10.8 **Force Majeure.** The Consultant shall be excused from performing any obligation or undertaking provided in this Agreement in the event and so long as the performance of any such obligation is prevented or delayed, retarded or hindered by an act of God, fire, earthquake, flood, explosion, actions of the elements, war, invasion, insurrection, riot, mob violence, sabotage, inability to procure or general shortage of labor, equipment, facilities, materials or supplies in the open market, failure of transportation, strikes, lockouts, action of labor unions, condemnation, requisition, laws, orders of governmental or civil or military or naval authorities, or any other cause, whether similar or dissimilar to the foregoing, not within the respective control of the Consultant.

10.9 **Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et. seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Sections 1090 *et. seq.*

Consultant hereby states that it is not now, nor has it been in the previous twelve (12) months, an employee, agent, appointee, or official of the City. If Consultant was an employee, agent, appointee, or official of the City in the previous twelve months, Consultant states that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of Government Code §1090 *et. seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of Government Code § 1090 and, if applicable, will be disqualified from holding public office in the State of California.

10.10 **Solicitation.** Consultant agrees not to solicit business at any meeting, or focus group, related to this Agreement, either orally or through any written materials.

10.11 **Contract Administration.** This Agreement shall be administered by the City Engineer or designee, who shall act as the City's representative. All correspondence shall be directed to or through the City Engineer or designee.

10.12 **Notices.** Any written notice to Consultant shall be sent to:

Any written notice to City shall be sent to:
City of Milpitas
455 East Calaveras Boulevard
Milpitas, CA 95035-5411
Attention: Greg Armendariz

with Copy to:
City of Milpitas
455 East Calaveras Boulevard
Milpitas, CA 95035-5411
Attention: Mark Rogge

10.13 Professional Seal [Not Applicable]

10.14 Integration; Incorporation. This Agreement, including all the exhibits attached hereto, represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral. All exhibits attached hereto are incorporated by reference herein.

10.15 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

The following exhibits are included:

Exhibit A	Scope of Consultant's Duties and Services
Exhibit B	Compensation Manner and Amount, Reimbursable, Estimated Payment Schedule, Hourly Rates
Exhibit C	Personnel, The Professional Team
Exhibit D	Certificate of Insurance, Certificate of Workers Compensation Insurance
Exhibit E	Invoice or Claim Declaration
Exhibit F	Limited City Support

The Parties have executed this Agreement as of the Effective Date.

CITY OF MILPITAS

CONSULTANT

Charles Lawson, City Manager

Principal/President

MILPITAS REDEVELOPMENT AGENCY

Charles Lawson, Executive Director

Principal/Secretary,
Chair Board of Directors

Attest:

Mary LaVelle, City Clerk/Agency Secretary

Approved as to Form:

Steven T. Mattas, City Attorney/Agency Counsel

EXHIBIT "A"
Consultant's Duties and Services

Consultant shall perform work on the following projects within the scope a budget shown herein:

Task 1 - Land Acquisition and Site Preparation

General management of the site preparation work, including managing the haz-mat abatement in both the buildings and the ground with consultant SCS and Contractors; rough grading the site with a soil management plan to maximize benefit to the City to either encapsulate contaminated soil or remove it, and provide rough grading and pads for buildings, with other consultants and contractors; implementation of site security, temporary construction facilities and other work related to preparing the site to eliminate unknowns and attract successful bids for the Garage and Library projects. Time period: February 2006 to December 31, 2006.

These items relate to site preparation and will therefore be charged to project 8154

NTE \$100,000

Task 2 - N. Main Dev. EIR Mitigations

General management of compliance with the mitigation monitoring plan and EIR mitigations as they relate to the City's projects directly and to other's projects indirectly. This work includes coordination of a Geologist and Anthropologist for excavation and grading work. This work also includes completion of the HABs documentation and historic mitigations working with Carey & Co. Preparation and review of the Health Center DDA is included in this task. Time period: February 2006 to December 31, 2006.

These items deal mainly with mitigation measures in the EIR and are therefore charged to project 8169

NTE 100,000

Task 3 - Main Sewer Pump Station, Project 6104

Project management services for design and construction of the Main Sewer Pump Station working with City staff as detailed elsewhere.

Design Process Support to include development of detailed project budget, schedule and identification and procurement of consultant services. Consultant to assist in management, coordination and monitoring of design and engineering consultants, prepare meeting minutes, identify options and / or requirements for regulatory agency compliance and tracking the resolution of agency requirements. Other tasks to include development and maintaining master project schedules, assist in the review of plans and specifications, assist in coordination of City staff plan review comments, assist City staff in preparation of reports and presentation to Council, City Commissions and neighborhood groups, as required, and assist in the preparation of bid documents. During Bidding, consultant to develop contractor interest in bidding work, coordinate pre-bid walk-throughs, coordinate contract document printing and distribution, maintain plan holders list, assist in the preparation and distribution of RFI and plan addendums, assist in preparation of bid forms and alternates, assist in awarding of project and assist in the issuance of Notice of Intent and complete City standard construction contract with all attachments.

Construction Administration to include set-up of project manual and information tracking system (ConstructWare), tracking and responding to RFIs, submittals and correspondence, administer pre-construction conference, coordinate weekly job-site meetings including preparation of agenda and meeting minutes, maintain photographic record of project, review contractor's request for change orders and preparation of approved change orders, assist in the monitoring of inspection services, review and processing of progress payment applications, manage processing of substitution requests, assist in claims analysis and dispute resolution, monitor contractor's submission of certified payroll, coordinate final inspection and development of correction list ("punch list"), prepare notice of completion and track the submission of record drawings, operations manuals, warranties and any spare parts. Time period: February 2006 to August 31, 2007 (construction close-out.)

Deliverables include monthly project status report in format required by City with details on project budget and schedule.

NTE

\$510,000

Task 4 – Main Street project coordination of schedules, development of City's Project Labor Agreements (PLAs), coordination with parties affected by the development, design and construction of the Main Street utilities, streetscape, construction routing and uses, and assisting the City in protecting the City's projects from potential impacts of others' work in the area. This task includes weekly meetings with stakeholders, including meeting preparation, notices, meeting minutes, action items tracking, and reporting. Coordination with Garage and Library plans, coordination with Senior Housing, County Medical Center, Apton, and other affected parties. Time period: February 2006 to December 31, 2006.

These items relate to the construction of Main Street and will therefore be charged to Project 8165 NTE \$100,000

Task 1, 2, and 4 are related. The City reserves the right to reallocate where funds are charged and to adjust budgets as necessary. The total aggregate amount for N. Main Street Development is

Total NTE \$300,000

Task 5 Contingency (only authorized in writing by City)

NTE \$ 60,000

Reimbursables

NTE \$ 10,000

Total Contract (includes reimbursables)

NTE \$ 880,000

Consultant shall report directly to the City Engineer for the Project Labor Agreement (PLA), included in Task 4; Health Center Design Development Agreement (DDA), included in Task 2, and the entire Task 4, Main Sewer Pump Station. Consultant shall report directly to the Capital Improvement Program Manager for Tasks 1, 2 and 4, except for the PLA and DDA mentioned above.

EXHIBIT B
Compensation Manner and Amount, Reimbursable,
Estimated Payment Schedule, Hourly Rates

Compensation shall be time and material based on the following Billing Rates and billed monthly in format following the task as listed in Exhibit "A".

Standard reimbursable expenses shall include approved sub-consultants, standard cell phone, postage, express mail, courier service, business mileage (option of actual fuel cost or IRS rate), parking and tolls, ConstructWare licenses (unless provided by City). Reimbursable expenses will be billed at actual costs plus ten (10) percent.

BILLING RATES (effective June 1, 2005 to May 31, 2006)

Project Admin	\$75
Project Engineer	\$95
Project Manager	\$116
Sen. Project Manager	\$170
CM/ Superintendent (incl. truck)	\$160
Project Executive	\$178
Sen. Estimator / Scheduler	\$142
Senior Project Engineer	\$150

BILLING RATES (effective June 1, 2006 to May 31, 2007)

Project Admin	\$78
Project Engineer	\$100
Project Manager	\$125
Sen. Project Manager	\$180
CM/ Superintendent (incl. truck)	\$170
Project Executive	\$190
Sen. Estimator / Scheduler	\$155
Senior Project Engineer	\$160

BILLING RATES (effective June 1, 2007 to May 31, 2008)

Project Admin	\$82
Project Engineer	\$105
Project Manager	\$135
Sen. Project Manager	\$190
CM/ Superintendent (incl. truck)	\$180
Project Executive	\$200
Sen. Estimator / Scheduler	\$165
Senior Project Engineer	\$170

PROJECT NAME:
PROJECT NO:
ACCOUNT NO:

[illegible]

EXHIBIT "C"
Personnel, The Professional Team

Project Executive
Project Manager
Construction Manager / Supt

Dennis Wong
Lissette Morales
Tom Yousch

EXHIBIT "D"

Certificate of Insurance, Certificate of Worker Compensation Insurance

EXHIBIT "E"

CITY OF MILPITAS

Invoice or Claim Declaration

I, [name of declarant], declare the following:

Chong Partners Architects has contracted with City of Milpitas and City of Milpitas Redevelopment Agency (City) for the [name of project] project. I am authorized by my employer ([consultant company name]) to prepare the attached invoice or claim for compensation (in other words, for money and/or time extensions) to City regarding this project (dated _____, 200_, and requesting \$_____ and/or ___ additional working days), and I did prepare said attached claim. I am the most knowledgeable person at [Consultant company name] regarding this claim.

I am aware that this claim is covered by law, including but not limited to California Penal Code section 72, Government Code sections 12650 *et seq.* (False Claims Act), and Business and Professions Code sections 17200 *et seq.* (Unfair Business Practices Act). I am aware that submission or certification of false claims, or other claims that violate law or the contract, may lead to fines, imprisonment, and/or other severe legal consequences for myself and/or [Consultant company name].

The attached claim is prepared and submitted in good faith, and to the best of my knowledge does not breach the contract between [Consultant company name] and City for this project, does not violate any law, satisfies all provisions of the contract, only contains truthful and accurate supporting data, and only requests an amount that accurately reflects the adjustments to money and time for which I honestly and in good faith believe that City is responsible under its contract with [Consultant company name].

So that I could declare that the statements in this declaration and the attached claim were true and correct, while preparing this declaration and claim I consulted with others (for example, attorneys, consultants, or others who work for [Consultant company name]) when necessary to assure myself that said statements were true and correct.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed _____, 200_, at _____, California.

[name of declarant]

EXHIBIT "F"
City Support

Limited to office space, furniture, telephone, computer with software, fax machine, shared printer, copier, filing cabinets, digital camera, standard office consumables and internet access (DSL or faster) with connection to files on City's server.